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I. INTRODUCTION

It was little more than five years ago, on June 5, 1981, that the federal Centers for Disease Control (CDC) first reported that an unnamed condition had caused a collapse of immune systems in five previously healthy homosexual men. Since then, the nation's concern about Acquired Immune Deficiency Syndrome (AIDS) has steadily escalated as headlines report more frightening developments. We now know that AIDS is a new, deadly, and rapidly spreading disease.[1] Currently no test can pinpoint exactly who will develop it,[2] and there is no cure.[3] Death is the certain result, and its

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1. One commentator has stated that the AIDS cases today are just "the tip of the iceberg" and that the number will increase drastically in a few years. The problem is not limited, moreover, to the 21,000 people currently suffering from AIDS or the 60,000 - 80,000 people with AIDS-related complex (ARC). A major dilemma exists because an estimated 1 to 1.5 million persons are infected with the virus but are not yet displaying any symptoms. *See* Dr. Harold M. Ginzburg, Comments to the Nat'l Conference on Labor (June 6, 1986), *reported in* Daily Lab. Rep. (BNA) No. 112, at A-09 (June 11, 1986).

An official at the World Health Organization's AIDS program stated that there could be 500,000 to 3 million AIDS cases worldwide unless preventive measures are taken to stop its spread. Thus far, AIDS has been found in 78 countries, including many in central Africa. Major increases in AIDS cases could occur in South America and Thailand, "where AIDS is 'knocking on the door.' " *Reported in* 1 AIDS Policy & Law (BNA) No. 24, at 6-7 (Dec. 17, 1986).

2. The tests currently available detect only the *antibodies* to the AIDS virus. The presence of these antibodies indicates no more than that the person has been exposed to the AIDS virus. The tests cannot differentiate between those persons who will eventually develop the disease and those who will suffer no long-term effects from exposure. *See* N.Y. DEP'T OF HEALTH, AIDS: 100 QUESTIONS & ANSWERS, Questions 50-51 (Jan. 1, 1986). Those who test positive for the presence of the AIDS virus are commonly called "seropositive."

The ELISA (enzyme-linked immunosorbent assay) test, the most commonly used test to detect the AIDS antibodies, was initially developed to screen potential blood donors in order to ensure the safety of blood supplies. It is extremely sensitive to the AIDS antibodies and results in a high "false positive rate" (*i.e.*, AIDS antibodies are not present even though the person tests positive for them). Thus, many ELISA positives are retested and, if the result is still positive, confirmed with the Western Blot test, which produces very few false positive results. The Western Blot test, however, produces false

shroud falls quickly.[4] While the great majority of the evidence indicates that AIDS is not spread by casual workplace contact,[5] much about the disease remains a mystery. Because AIDS victims include a high percentage of homosexual men and users of illegal drugs,[6]

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negatives at a significant rate. A positive result on either the ELISA or Western Blot test can mean any of the following:

1. The person has been exposed to the virus and will eventually develop AIDS or ARC.
2. Exposure to the virus has occurred and the virus is alive within the body, but the person will never develop AIDS.
3. The person has been exposed to the virus, but the immune system has successfully fought off its invasion. The antibodies, however, still remain.
4. A technical error in the testing results creates a positive result even though no exposure has occurred.

COMMERCE CLEARING HOUSE, AIDS, EMPLOYER RIGHTS AND RESPONSIBILITIES ¶ 6 (Special Report) (1985) [hereinafter AIDS, EMPLOYER RIGHTS AND RESPONSIBILITIES].

Researchers have found that a *reduced level* of serum antibody to the HLTV-III virus is "significantly predictive of the development of AIDS." Polk, *Predictors of the Acquired Immunodeficiency Syndrome Developing in a Cohort of Seropositive Homosexual Men*, 316 NEW ENG. J. OF MED. 61, 65 (1986). One suggested theory for this finding is that the antibody levels decline as the immune system progressively succumbs to the disease. *See id.* This fact suggests that persons with high levels of the serum antibody are less likely to ultimately develop the disease.

3. Some scientists at first predicted a cure by 1986, but now it appears an AIDS solution is at least five years away. *See* Siwolop, *AIDS Drugs: Some Relief, But Adverse Side Effects*, DISCOVER, Dec. 1985, at 38.

Anthony S. Fauci, coordinator of AIDS research at the National Institutes of Health, told a Senate panel that human testing for an AIDS vaccine could begin at the end of 1987 or the beginning of 1988. He cautioned, however, that " 'even if we do have a vaccine, we don't expect it to be available for widespread use until well into the 1990's.' " *Official Predicts Human Tests Soon in Search for an AIDS Vaccine*, N.Y. Times, Jan. 16, 1987, at A12, col. 1.

4. The death rate is 80% two years after diagnosis and no AIDS patient is known to have survived more than three years. AIDS, EMPLOYER RIGHTS AND RESPONSIBILITIES, *supra* note 2, at ¶ 4.

5. The Centers for Disease Control (CDC), a branch of the United States Public Health Service, published guidelines discussing the transmittal of AIDS: *AIDS is not spread by the kind of "nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace," including such settings as offices, schools, factories, and construction sites.* CENTERS FOR DISEASE CONTROL, SUMMARY: RECOMMENDATIONS FOR PREVENTING TRANSMISSION OF INFECTION WITH HUMAN T-LYMPHOTROPIC VIRUS TYPE III/LYMPHADENOPATHY-ASSOCIATED VIRUS IN THE WORKPLACE, *reprinted in* 34 MORBIDITY AND MORTALITY WEEKLY REP. 681, 682, 694 (Nov. 15, 1985) (emphasis added) [hereinafter CDC, RECOMMENDATIONS]. Workers known to be infected with the AIDS virus should not be restricted from work on this account, nor should they be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains. *Id.* at 694. In the case of accidents in the work setting, equipment that is contaminated with blood or other body fluids from any worker, known to be infected or not, should be cleaned with soap and water or a detergent. *Id.* A disinfectant or a fresh solution of household bleach, as described in the guidelines, should be used to wipe the area after the cleaning. *Id.*

6. As of January 30, 1987, there were 29,582 reported AIDS cases. The Centers for

many consider the disease the result of illicit conduct, and its victims are isolated not only by others' dread of catching the deadly disease but also by others' notions of morality.

The new disease raises a myriad of thorny legal questions in all the settings in which it has an impact—from the delivery room to the mortuary. The workplace has been especially troubled with these issues, largely because of the plethora of existing and sometimes conflicting statutory safeguards of employee rights. The employer who is confronted with an AIDS victim is on a legal tightrope between the rights of the sufferer and of those co-workers who fear they may fall prey to the disease if the victim remains in their midst. Because the disease is so new and resembles a modern pox or plague that causes quick and certain death in an exponentially growing number of targets, very little law has developed to guide employers.

This article will briefly outline the available medical facts about AIDS and discuss the major legal issues those facts raise for employers. First, we will focus on whether AIDS victims are protected under federal, state, and local statutes that prohibit discrimination on the basis of handicap and other protected characteristics, such as national origin or sexual preference. Second, we will examine the extent to which the accumulation and disclosure of data about AIDS victims violates their common-law and constitutional rights, and whether the employer who fails to disclose the plight of an AIDS victim to either the victim or co-workers runs any legal risks. Third, we will look at other potential sources of employer liability to an AIDS victim, such as unemployment compensation laws and common-law tort actions. Finally, we will examine the rights of the co-workers of AIDS victims under the National Labor Relations Act,

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Disease Control reports that 66% of the adult cases have occurred in sexually active homosexual and bisexual men who had multiple partners; 8% occurred in homosexual and bisexual men who use intravenous drugs; 17% occurred in present or past abusers of intravenous drugs; 4% occurred in heterosexual persons who had some sexual contact with someone with AIDS or at risk for AIDS; 2% occurred in adult transfusion recipients; and 1% occurred in persons with hemophilia or other coagulation disorders. The remaining 3% of adult AIDS patients do not fall into any of these groups and the way in which they contracted the disease is still unknown. In children, 80% of the reported cases occurred in children whose parents have AIDS or are at high risk for AIDS; 12% in transfusion recipients; 5% in hemophiliacs; and in 3% the source of the disease is unknown. Telephone inquiry to Surveillance and Evaluation Branch, United States AIDS Program, Center for Infectious Diseases, Centers for Disease Control (Jan. 30, 1987) (Tel. no. (404) 329-3534); *see also* CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REP. 1 (Jan. 26, 1987).

the Labor Management Relations Act, the Occupational Safety and Health Act, and other pertinent statutes.

II. MEDICAL EVIDENCE

The AIDS virus, labeled Human T-lymphotropic Virus, Type III (HTLV-III), attacks the body's immune system and renders it incapable of fighting off rare "opportunistic" diseases.[7] The virus is transmitted through sexual contact, blood transfusions, and needle sharing by drug users.[8] A child may contract the virus from an infected mother immediately before, during, or after birth.[9]

Individuals infected with the AIDS virus develop antibodies,[10] which can be detected by the ELISA (enzyme-linked immunosorbent assay) and Western Blot tests. The presence of antibodies, however, does not necessarily mean that the individual will get AIDS,[11] or even that the individual's body continues to harbor the virus.[12]

Symptoms associated with the AIDS disease include fever, weight loss, fatigue, diarrhea, and swollen lymph nodes.[13] They may not surface until after an incubation period, the time between infection with the virus and the onset of symptoms. This period may vary from six months to five years or more.[14]

Once an individual develops AIDS, the victim's immune system becomes so weakened that opportunistic diseases invade the body and eventually cause death.[15] The victim usually does not die of AIDS but instead from a disease that ravages the body once the AIDS virus has set the stage. The most common opportunistic dis-

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7. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FACTS ABOUT AIDS 1 (Aug. 1985) [hereinafter FACTS ABOUT AIDS].

8. *Id.* at 2.

9. *Id.*

10. Researchers are not certain how long after exposure the antibodies develop. In some cases antibodies have been detected four to seven weeks after exposure, while in other cases antibodies had not been detected more than six months after exposure. CENTERS FOR DISEASE CONTROL, PROVISIONAL PUBLIC HEALTH SERVICE INTER-AGENCY RECOMMENDATIONS FOR SCREENING DONATED BLOOD AND PLASMA FOR ANTIBODY TO THE VIRUS CAUSING ACQUIRED IMMUNODEFICIENCY SYNDROME, *reprinted in* 34 MORBIDITY AND MORTALITY WEEKLY REP. 1 (Jan. 11, 1985).

11. Estimates suggest that an individual exposed to the virus has a 20% risk of developing "full-blown AIDS" and a 25% risk of developing a related condition. *See* Osborn, *The AIDS Epidemic: An Overview of the Science*, ISSUES IN SCIENCE AND TECHNOLOGY, Winter 1986, at 40, 50.

12. *See supra* note 2.

13. *See* FACTS ABOUT AIDS, *supra* note 7.

14. *Id.* at 2.

15. *See* Langone, *AIDS Special Report*, DISCOVER, Dec. 1985, at 28, 52.

eases include rare forms of pneumonia and skin cancer.[16]

Scientists and researchers currently believe that AIDS is not transmitted through casual contact.[17] One commentator has suggested that, because AIDS is spread sexually and through blood and blood products, "the keys to preventing transmission of the virus are (1) the screening of all donated blood and (2) education and other attempts to modify risky sexual behavior and intravenous drug abuse."[18] Most experts urge that persons who have only casual contact with persons infected with AIDS (*e.g.*, co-workers) are at virtually no risk of contracting AIDS.[19]

Notwithstanding this medical evidence, near-hysteria about the nature and transmission of the AIDS virus remains prevalent in some quarters. According to a recent study, however, education can reduce generalized fears about contracting the disease. Researchers at the University of California at San Francisco found that members of high-risk groups, who were well informed about AIDS, had less general fear than individuals at little or no risk of contracting the disease, who possessed little knowledge about it.[20] The study concluded that public health information designed to educate individuals about AIDS could reduce this fear.[21]

III. LEGAL ISSUES

A. Are AIDS Victims Protected Against Employment Discrimination?

1. Do Handicap Discrimination Laws Cover AIDS Victims?—In assessing employer obligations concerning AIDS victims, one critical legal issue is whether AIDS will be considered a handicap under laws that prohibit employment discrimination against handicapped individuals. If AIDS is a handicap, an employer not only is obligated to refrain from discrimination but also may have a duty to make reasonable accommodations for any AIDS-related impediments to an afflicted employee's ability to work.

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16. Pneumocystis carinii, a lung infection caused by parasites, and Kaposi's sarcoma, a skin cancer, are the two most common diseases that attack AIDS victims. *Id.*

17. *See, e.g.*, CDC, RECOMMENDATIONS, *supra* note 5, at 681 ("AIDS is a bloodborne, sexually transmitted disease that is not spread by casual contact . . . ."); Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. OF MED. 344 (1986); Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. OF MED. 380 (1986).

18. Sande, *supra* note 17, at 382.

19. *E.g., id.*

20. *Reported in* 1 AIDS Policy & Law (BNA) No. 17, at 8 (Sept. 10, 1986).

21. *Id.*

a. Is AIDS a Handicap?: Federal Law.—Until the Supreme Court's decision on March 3, 1987, in *School Board of Nassau County, Florida v. Arline*,[22] discussed below, the most significant opinion on whether AIDS is a handicap had been a memorandum issued by the United States Department of Justice (the Memorandum).[23] The Memorandum responded to an inquiry from the Department of Health and Human Services (HHS) Office of Civil Rights (OCR) on whether AIDS is a handicap covered by section 504 of the Rehabilitation Act of 1973.[24] Section 504 prohibits discrimination against handicapped individuals in programs conducted or funded by federal agencies.[25] A companion section of the Rehabilitation Act, section 503,[26] which is enforced by the Office of Federal Contract Compliance Programs (OFCCP), requires covered government contractors and subcontractors to take affirmative action to employ qualified handicapped individuals. The following statutory definition of "handicapped individual" applies to both sections 504 and 503:[27] "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[28]

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22. 55 U.S.L.W. 4245 (U.S. Mar. 3, 1987).

23. Memorandum from Assistant Attorney General Cooper on Application of Section 504 of the Rehabilitation Act to Persons with AIDS (June 23, 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986) [hereinafter Justice Department Memorandum].

24. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982) [hereinafter § 504].

25. Section 504 provides in pertinent part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his [or her] handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

26. Rehabilitation Act of 1973, § 503, 29 U.S.C. § 793 (1982) [hereinafter § 503].

27. It would seem, therefore, that the agencies enforcing §§ 503 and 504 would take consistent approaches on whether AIDS is a handicap covered by this definition. An interagency task force, comprising representatives from several government agencies that have responsibility for enforcement of handicap discrimination laws, apparently has been studying the issue. The OFCCP is currently investigating complaints of employment discrimination against AIDS victims, but has not yet rendered a final opinion on the circumstances under which § 503 will be applied to AIDS victims. *See* Daily Lab. Rep. (BNA) No. 57, at A-4 (Mar. 25, 1986).

28. 29 U.S.C. § 706(7)(B) (1982). The OFCCP regulations set forth the same definitions. *See* 41 C.F.R. § 60-741.2 app. A (1986). The regulations further define the meaning of "physical or mental impairment" as:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech or-

Applying this statutory definition, the Memorandum concluded that, although the *disabling effects* of AIDS or AIDS Related Complex (ARC) may be a "substantial limitation on major life activities," and therefore a handicap,[29] *the ability to transmit the disease to others* is not a protected characteristic under section 504.[30] Under this reasoning, an employer could lawfully discriminate against persons with AIDS or ARC if it did so out of fear of contagion (whether or not that fear is rational) rather than because of the disabling aspects of the disease. Furthermore, individuals who test positive for antibodies to the AIDS virus, but who are not afflicted by the disabling effects of AIDS or ARC, would have no protection whatsoever against any discrimination resulting from the seropositive response.[31]

This approach hinged on an analogy to disease carriers who are immune to the disease but capable of transmitting it to others. The Memorandum reasoned that, because these carriers are not afflicted with disabling effects, and no physical or mental impairment interferes with any major life function, the carriers are not handicapped under the Rehabilitation Act.[32] Thus, because "[c]ommunicability alone is not a handicap . . . it does not become a handicap . . . simply because it is accompanied by the disease's disabling effects."[33] From this distinction between AIDS' disabling effects and the ability to transmit the disease, the Memorandum concluded that employers may take discriminatory actions against AIDS victims if they fear the

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gans; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1986).

Many state legislatures and state fair employment agency regulations have adopted similar definitions of "handicap" and "impairment."

29. Justice Department Memorandum, *supra* note 23, at D-7. The Memorandum noted that AIDS creates an impairment that "substantially limits the major life activity of resisting disabling and ultimately fatal diseases and may directly cause brain damage and disorders." *Id.* Another substantial limitation posed by AIDS may be a physical weakening, and in such cases, the Memorandum concluded, "it would be a factual question whether any particular stage of the illness satisfied the statutory requirement." *Id.* at D-7 n.63.

30. *Id.* at D-8 to D-9.

31. The Memorandum concluded that § 504 protects seropositive individuals only against discrimination based on the perception that they are disabled, but not against discrimination based on the perception that they are contagious. *Id.* at D-10. It further notes that a physical condition, including seropositivity, does not become a handicap "simply because it is a statistical predictor of some future disability or shortened life span." *Id.* at D-9 n.73.

32. *Id.* at D-8.

33. *Id.* at D-9.

AIDS victim is contagious,[34] even if that fear is irrational.[35]

The Supreme Court's recent decision in *School Board of Nassau County, Florida v. Arline*[36] calls into question the analytical underpinnings of the Justice Department Memorandum. Gene Arline, an elementary school teacher, contracted the contagious disease tuberculosis at the age of 14. Although she was in remission for twenty years, Ms. Arline again tested positive for the disease in 1977 and on two later occasions. At the end of the 1978-79 school year, the School Board voted to discharge Arline " 'not because she had done anything wrong,' but because of the 'continued reoccurence [sic] of the tuberculosis.' "[37] The trial court held that although "she suffers a handicap," nevertheless Ms. Arline was not a handicapped person within the meaning and protections of the Rehabilitation Act. In particular, the district court concluded that Congress never intended contagious diseases to be included within the definition of a handicap.[38] The Eleventh Circuit reversed, ruling that diseases are *not excluded* from coverage under section 504 simply because they are contagious.[39]

The Supreme Court affirmed. Writing for a seven-person majority,[40] Justice Brennan first concluded that Ms. Arline had a "record of an impairment" within the meaning of the Rehabilitation Act, because she had been hospitalized for tuberculosis soon after she first contracted the disease in 1957.[41] The Court then rejected the school board's contention, also raised in the Justice Department's *amicus* brief, that, although she had been impaired, Ms. Arline nevertheless was not "handicapped" within the meaning of section 504 because her discharge rested on her contagiousness rather than on her diminished physical capabilities.[42] Justice Brennan wrote:

We do not agree with petitioners that, in defining a handi-

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34. *Id.* at D-11.

35. *Id.* at D-12.

36. 55 U.S.L.W. 4245 (U.S. Mar. 3, 1987).

37. *Id.* at 4246 (quoting record app. at 49-52).

38. *Id.*

39. 772 F.2d 759, 764 (11th Cir. 1985). The circuit court found that Arline became handicapped when she was afflicted with the disease because it "substantially limits . . . major life activities." *Id.* (citing 29 U.S.C. § 706(7)(B) (1982); 45 C.F.R. § 84.3(j)(2)(i)(A) (1985)). The court also concluded that Arline's remission periods were protected under § 504 because she "has a record of such an impairment" and "is regarded as having such an impairment" by the employer during these periods. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(iii)-(iv) (1985)).

40. Chief Justice Rehnquist and Justice Scalia dissented.

41. 55 U.S.L.W. at 4247.

42. *Id.* at 4247-48.

> capped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[43]

Thus, *Arline* holds that a person who is *both* contagious and has either an existing impairment or a record of impairment is handicapped within the meaning of section 504.[44] Justice Brennan reasons that, by extending coverage to those who are simply "regarded as having" a physical or mental impairment,[45] Congress demonstrated that it was "as concerned about the effect of an impairment on others as it was about its effect on the individual."[46] The Court concluded that Congress intended to protect persons with impairments that "might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the *negative reactions of others* to the impairment."[47] Thus, "the effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself."[48] The Court particularly noted that: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[49]

While some parts of the opinion merely echo the rather narrow ruling of the Eleventh Circuit,[50] much of the language could be

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43. *Id.* (footnote omitted).

44. Consequently, a person who is not only seropositive but also has an "impairment" or a "history of impairment" associated with AIDS should be protected as a handicapped person within the meaning of § 504.

45. *See* 29 U.S.C. § 706(7)(B)(iii) (1982).

46. 55 U.S.L.W. at 4248.

47. *Id.*

48. *Id.* at 4248 n.10. The Court noted that, contrary to the Solicitor General's position at oral argument, HHS regulations that identify "cosmetic disfigurement" as physical impairment support this conclusion. *See* 45 C.F.R. § 84.3(j)(2)(i)(A) (1986).

49. 55 U.S.L.W. at 4248.

50. *See id.* at 4248-49 ("We conclude that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.").

more broadly construed. The Court left no doubt that, at least when an individual is suffering, has suffered, or is perceived to be suffering from a physical or mental impairment—even one that does not otherwise cause any "substantial limiting effect" on the individual's "major life activities"—the impairment is a protected handicap if the individual is limited in major life activities by the "negative reactions of others to its contagiousness."[51]

Under *Arline*, therefore, unlike the Justice Department Memorandum, an employer cannot avoid the coverage of the Rehabilitation Act by simply contending that a disease's contagious nature, rather than its disabling effect, precipitated an adverse employment decision. In the context of the statutory definition of "handicapped individual," if the individual has had, now has, or is regarded as having an "impairment," it does not matter whether the "substantially limiting effect" of the impairment on "major life activities" is caused by its actual or perceived contagiousness as opposed to its actual or perceived disabling effect. Thus, AIDS victims who are actually suffering from the disease's effects cannot be discriminated against solely on the basis that AIDS is contagious.

Of course, the only symptom shown by many who test positive is the factor which causes seropositivity—*i.e.*, the presence of the AIDS antibody in the bloodstream.[52] The *Arline* Court, however, explicitly reserved in a footnote the question raised by the Justice Department Memorandum of whether a person who is merely contagious, but who has no existing impairment or record of impairment, is handicapped.[53] Because *Arline* leaves open the issue of whether a positive test result, by itself, would constitute an "impairment" under section 504, future litigation is likely to focus on whether contagiousness, without more, qualifies as an "impairment." The Court's comment that it would be "unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient" to justify

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51. *Id.* at 4248.

52. *See supra* note 2.

53. 55 U.S.L.W. at 4248 n.7 (referring specifically to AIDS and the Justice Department's conclusion that contagiousness alone does not constitute a protected handicap). If contagiousness alone is not an impairment, but merely a condition that substantially limits a major life activity, seropositive individuals whose handicap discrimination claims rest on proof of some physical or mental impairment associated with seropositivity might be able to satisfy that burden by showing that they suffered some mental impairment as a result of both the certain and the potential life changes that seropositivity portends. Alternatively, claimants could satisfy the impairment requirement with medical evidence showing that seropositivity itself causes some physical disability.

discriminatory treatment,[54] suggests that those contending that contagiousness alone is not an "impairment" have the tougher side of the argument.

So far only one federal court has confronted the specific issue of whether AIDS is a handicap. In *Thomas v. Atascadero Unified School District*[55] a federal district court in California granted a motion for a preliminary injunction filed on behalf of a child with AIDS who was prohibited from attending kindergarten after he bit a classmate. The court held that AIDS is a protected handicap under section 504 and that there was not sufficient evidence to show that the child's presence in the classroom created a risk that the disease would be transmitted.

b. Is AIDS a Handicap?: State Law.—Several states and localities have declared discrimination against individuals with AIDS unlawful. Some city governments have enacted special ordinances to prohibit discrimination based on AIDS.[56] Most states and many local jurisdictions already prohibit discrimination against handicapped individuals under statutes and ordinances patterned after the federal Rehabilitation Act or Title VII of the Civil Rights Act of 1964. Ap-

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54. 55 U.S.L.W. at 4247-48.

55. No. 886-609AHS (BY) (C.D. Cal. Nov. 17, 1986), *reported in* Daily Lab. Rep. (BNA) No. 223, at A-1 (Nov. 19, 1986).

56. A San Francisco ordinance, effective December 20, 1985, prohibits discrimination based on the fact that a person has or is perceived to have AIDS. This prohibition extends to employment, housing, public accommodations, educational institutions, and city facilities. San Francisco, Cal., Ordinance No. 49,985 (Dec. 20, 1985), *reprinted in* 3 Empl. Prac. Guide (CCH) ¶ 20,950B (Dec. 1985).

On August 16, 1985, a Los Angeles public ordinance prohibiting employment discrimination against persons perceived to have AIDS and persons with AIDS or AIDS-related conditions became effective. LOS ANGELES, CAL., MUNICIPAL CODE ch. 4, art. 5.8 (1985). The Los Angeles City Attorney's Office, charged with enforcing the ordinance, successfully mediated the first 45 complaints after the ordinance took effect. A deputy city attorney noted that the " 'educational usefulness' of the ordinance has had a 'tremendous effect on employers and citizens . . . . It has been a very useful social change mechanism to let the community know that AIDS discrimination is inhuman and inappropriate, but also illegal.' " Daily Lab. Rep. (BNA) No. 48, at A-7 (Mar. 12, 1986).

Mayor W. Wilson Goode of Philadelphia issued an Executive Order on April 15, 1986, prohibiting discrimination against persons with AIDS for the purposes of employment and service. The order was based on new medical information that AIDS is not communicable by casual contact and on a city solicitor's opinion that determined AIDS to be a handicap. *See* Daily Lab. Rep. (BNA) No. 86, at A-4 (May 5, 1986).

On December 11, 1986, the City Council of Austin, Texas passed a broad ordinance banning AIDS discrimination in employment, housing, and public accommodations. The ordinance extends protection to persons with AIDS and ARC as well as to individuals who are seropositive or who are perceived to be at risk of contracting the disease. *See* Daily Lab. Rep. (BNA) No. 250, at A-3 (Dec. 31, 1986).

See also infra note 134 and accompanying text.

proximately two-thirds of the state agencies that investigate claims under these statutes have formally or informally stated that AIDS is a protected handicap.[57] Moreover, several state court and administrative agency decisions have held that AIDS is a handicap under such statutes.[58]

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57. The National Gay Rights Advocates (NGRA) recently conducted a survey of all 50 states and the District of Columbia to determine their positions on whether AIDS is a handicap. The survey results were based on formal policies, case law, and informal responses from state agencies in charge of enforcing state handicap discrimination laws. The survey reported that 33 states and the District of Columbia will accept AIDS-related discrimination complaints or have already declared that their state statutes prohibit such discrimination. *See* NATIONAL GAY RIGHTS ASS'N, AIDS AND HANDICAP DISCRIMINATION: A SURVEY OF THE 50 STATES AND THE DISTRICT OF COLUMBIA (1986), *reported in* 123 Lab. Rel. Rep. (BNA) 96 (1986) (available from NGRA, 540 Castro St., San Francisco, CA 94114). In particular:

— The Washington, D.C. Office of Human Rights has determined AIDS to be a physical handicap under the D.C. Human Rights Act of 1977. *See* IMPACT, July 16, 1986, at 8.

— The Michigan Civil Rights Commission announced on August 25, 1986, that AIDS is considered a handicap under Michigan's antidiscrimination law protecting the handicapped. *See* 1 AIDS Policy & Law (BNA) No. 17, at 4 (Sept. 10, 1986).

— The Maine Human Rights Commission counsel testified on March 17, 1986, that it is unlawful to discriminate against anyone with AIDS because AIDS is a protected physical handicap under a Maine antibias law. *See* 2 Empl. Prac. Guide (CCH) ¶ 5023 (June 1986).

— On March 13, 1986, an opinion letter from the Oregon Bureau of Labor and Industries stated that Oregon's Civil Rights Division has interpreted the statutory ban on job discrimination against the physically and mentally handicapped to include AIDS. *See* 2 Empl. Prac. Guide (CCH) ¶ 5020 (Oct. 1986).

— The New Jersey Division on Civil Rights has publicized its position that the New Jersey law against handicap discrimination covers AIDS, unless the AIDS victim would be unable to work without jeopardizing the health and safety of co-workers. *See* 2 Empl. Prac. Guide (CCH) ¶ 5027 (July 1986).

— In January 1986 the Massachusetts Commission Against Discrimination stated it has interpreted the state law barring handicap employment discrimination to prohibit discrimination against persons with AIDS and persons who are perceived to be afflicted with AIDS. *See* 2 Empl. Prac. Guide (CCH) ¶ 5024 (June 1986).

— New York's Division of Human Rights announced that AIDS is a disability under the State Human Rights Act. The Division expressed its intent to accept complaints from persons who claim they were discriminated against because they have AIDS, are perceived to have AIDS, are in an identified high-risk group for susceptibility to AIDS, are perceived to be susceptible to AIDS because of a relationship with a person who has AIDS, or are identified as being susceptible to AIDS because they tested positive for the HTLV-III antibody. *See* 8A Fair Empl. Prac. Man. (BNA) 455:3081 (Dec. 1985).

58. *See, e.g.*, Department of Fair Employment & Hous. v. Raytheon Corp., No. 83-84-LI-03101, L-33998 (Cal. Dep't of Fair Employment & Hous. Feb. 5, 1987), *reprinted in* Daily Lab. Rep. (BNA) No. 29, at E-1, E-5 (Feb. 13, 1987) ("AIDS thus falls squarely within the physical handicap coverage" of state fair employment and housing statute); Cronan v. New Eng. Tel. Co., No. 80332 (Mass. Sup. Ct., Suffolk County Aug. 15, 1986), *reported and reprinted in* Daily Lab. Rep. (BNA) No. 179, at A-4, D-1 (Sept. 16, 1986); State of New York v. 49 West 12 Tenants Corp., No. 43604/1983 (N.Y. Sup. Ct. 1984); Shut-

Shuttleworth v. Broward County Office of Budget and Management Policy[59] was the first decision under a state antidiscrimination statute holding that AIDS is a handicap. Lacking a statutory definition of "handicap,"[60] the Florida Commission on Human Relations relied on the reasoning of the Eleventh Circuit's decision in *Arline* and on the definition of "handicap" in Webster's Third International Dictionary to conclude that, based on the medical evidence presented, an AIDS victim "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."[61] The employer's major concern in *Shuttleworth* appeared to be the higher risk posed by AIDS victims to persons whose immune systems are depressed by various drugs or illnesses. The Commission concluded, however, that this risk exists only when AIDS victims have "easily transmittable *opportunistic* diseases."[62]

In *Cronan v. New England Telephone Co.*[63] a Massachusetts supe-

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tleworth v. Broward County Office of Management and Budget, No. 85-0624 (Fla. Comm'n on Human Relations Dec. 11, 1985), *reprinted in* 2 Empl. Prac. Guide (CCH) ¶ 5014 (Feb. 1986); Racine Educ. Ass'n v. Racine Unified School Dist., No. 8650279 (Wis. Dep't of Indus., Lab. & Human Relations, Equal Rights Div. April 30, 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1986).

Several other complaints are pending before various state courts and administrative agencies. *See, e.g.*, Doe v. Sinacola & Sons Excavating, Inc., No. 86-320825NZ (Cal. Cir. Ct., Oakland County filed Oct. 9, 1986), *reported in* 1 AIDS Policy & Law (BNA) No. 23, at 2 (Dec. 3, 1986) (former employee filed a $10 million lawsuit charging employer with violating state law prohibiting discrimination against person with AIDS, and alleging breach of contract and intentional infliction of emotional distress); Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, No. 86-4235 (Dist. Ct. La., Sec. K, Div. 1, filed Sept. 29, 1986), *reported in* Daily Lab. Rep. (BNA) No. 195, at A-5 (Oct. 8, 1986) (nurse alleges AIDS discrimination under state handicap laws and § 504 because he was transferred and subsequently fired after his roommate was admitted to the hospital for treatment of AIDS and he repeatedly refused the hospital's request to take an AIDS test—nurse charges that the hospital discriminated against him on the basis of a perceived fear that he was contagious due to his exposure to an AIDS victim. This suit may be the first to challenge the June 23, 1986, Justice Department opinion that AIDS discrimination is not illegal under § 504 if the employer's actions are based on a fear of contagion); Goodfellow v. Quinn Patent Drawing Serv., Inc., Chancery No. 16662 (Va. Cir. Ct. filed Feb. 13, 1986), *reported in* Daily Lab. Rep. (BNA) No. 21, at A-6 (Feb. 14, 1986) (employee alleges he was fired after he was diagnosed as having AIDS).

59. No. 85-0624 (Fla. Comm'n on Human Relations Dec. 11, 1985), *reprinted in* 2 Empl. Prac. Guide (CCH) ¶ 5014 (Feb. 1986).

60. *See* FLA. STAT. §§ 760.01 - 760.10 (1983).

61. *Shuttleworth*, 2 Empl. Prac. Guide (CCH) at ¶ 5014.

62. *Id.* (emphasis in original). The employer offered no evidence to show that Shuttleworth suffered from any opportunistic disease. After the state agency ruling, Shuttleworth filed a federal discrimination claim against his employer in federal court. That claim settled on December 5, 1986, and the employer agreed to rehire Shuttleworth and to pay him $196,000. *See* White Collar Rep. (BNA) No. 60, at 565 (Dec. 10, 1986).

63. No. 80332 (Mass. Sup. Ct., Suffolk County, Aug. 15, 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 179, at D-1 (Sept. 16, 1986).

rior court relied on *Shuttleworth*, the Justice Department Memorandum, the AIDS policy of the Massachusetts Commission Against Discrimination, and the Eleventh Circuit's decision in *Arline*, each of which it read as concluding on varying grounds that some aspects of AIDS or similar contagious diseases are handicaps.[64] Without indicating which, if any, of the opinions it was following or what its final decision would be, the court concluded that Cronan's allegation that he was handicapped by AIDS was sufficient to withstand a motion to dismiss.[65]

So far, none of the state decisions has followed the Justice Department Memorandum in distinguishing between the contagious nature of AIDS and its disabling effects, and, although not binding on them, the Supreme Court's *Arline* opinion now can be expected to serve as a guidepost for state courts and administrative agencies dealing with AIDS issues in the future.

c. Is An AIDS Victim "Qualified?"—If AIDS is a handicap, the next issue is whether AIDS victims nevertheless are qualified for the jobs they seek. To be protected either by section 503 or 504 of the federal Rehabilitation Act or by most state antidiscrimination laws, an individual must be "qualified" or "otherwise qualified."[66] Under both HHS and OFCCP regulations, however, before excluding a handicapped applicant as not "qualified" an employer first must determine whether "reasonable accommodations" could be made to remove the impediment posed by the handicap.[67] Further, under these agencies' regulations, job requirements can exclude handicapped individuals on the basis of their disability only if the job requirement is directly relevant to the work or is a business necessity.[68]

In *Arline* the Supreme Court made it plain that the danger that

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64. *Id.* at D-3.

65. *Id.* This case was recently settled and, under the terms of the settlement agreement, Cronan will be allowed to return to work. *See* Daily Lab. Rep. (BNA) No. 204, at A-2 (Oct. 22, 1986).

66. Section 503 of the Rehabilitation Act protects "qualified handicapped individuals," 29 U.S.C. § 793 (1982), while § 504 protects "otherwise qualified handicapped individual[s]," *id.* at § 794. The HHS and OFCCP regulations under these sections interpret these terms synonymously. *See* 41 C.F.R. § 60-741.2 (1986) (defining "qualified handicapped individual"); 45 C.F.R. § 84.3(k) (1986) (same). An "individualized inquiry" is required to determine whether a handicapped individual is qualified or otherwise qualified. School Bd. of Nassau County, Fla. v. Arline, 55 U.S.L.W. 4245, 4249 (U.S. Mar. 3, 1987).

67. *See* 41 C.F.R. § 60-741.6(b)-(d) (1986); 45 C.F.R. § 84.12 (1986). *See also Arline*, 55 U.S.L.W. at 4249 & n.17.

68. 41 C.F.R. § 60-741.5(c) (1986); 45 C.F.R. § 84.13 (1986).

handicapped individuals pose to the health and safety of their co-workers or the general public clearly may be a consideration in determining whether those individuals are qualified: "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[69] The Court adopted a suggestion from the American Medical Association's *amicus* brief that the following facts, " 'based on reasonable medical judgments given the state of medical knowledge,' " should be considered in determining whether the contagious nature of a handicap disqualifies an individual from his or her job: " '(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.' "[70] Not included among these factors was a suggestion in the Justice Department Memorandum that, in assessing health and safety dangers, an employer may consider the extent to which a normal person would willingly risk exposure to the AIDS virus. The Memorandum had reasoned that, in the case of an incurable, painful, and fatal disease about which medical knowledge is in the early stages of development, most people would avoid exposure to even the slightest risk of infection.

The *Arline* opinion did not specifically address the burden of proof on the employer who wishes to exclude a handicapped individual from a job due to the contagiousness of his or her condition, except to state that "courts ordinarily should defer to the reasonable medical judgment of public health officials," on the safety risks posed by a particular contagious disease,[71] thereby signaling its probable willingness to accept the recommendations of the Centers for Disease Control on this subject with regard to AIDS.[72]

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69. *Arline*, 55 U.S.L.W. at 4249 n.16. *See also* Smith v. Administrator of Veterans Affairs, 32 Fair Empl. Prac. Cas. (BNA) 986 (C.D. Cal. 1983); Westinghouse Elec. Corp. v. State Div. of Human Rights, 63 A.D.2d 170, 406 N.Y.S.2d 912 (1978), *aff'd*, 49 N.Y.2d 234, 401 N.E.2d 196, 425 N.Y.S.2d 74 (1980); *In re* Unlawful Employment Practices Based Upon a Physical Handicap by Montgomery Ward & Co., 280 Or. 163, 570 P.2d 76 (1977). Increased costs of health benefits for handicapped workers are not a sufficient job-related reason for denying employment, however. *See, e.g.*, State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 218, 480 N.E.2d 695, 697, 491 N.Y.S.2d 106, 108 (1985).

70. *Arline*, 55 U.S.L.W. at 4249 (quoting Brief for American Medical Association as *amicus curiae* at 19); Justice Department Memorandum, *supra* note 23, at D-12 to D-13.

71. *Arline*, 55 U.S.L.W. at 4249.

72. *See* CDC, RECOMMENDATIONS, *supra* note 5.

Most courts have held that an employer who wishes to exclude from employment a handicapped individual who can presently do the job at issue has the burden of proving that employment of the person would create a probability that the person would suffer further severe harm (or cause harm to others) within the reasonably foreseeable future.[73] Under this standard, an employee who merely tests positive for the AIDS antibody may not present enough of a future risk to justify denial of employment. Based on current medical knowledge, there exists only a twenty percent chance of developing AIDS once infection occurs.[74] This percentage, although alarming, would probably not justify exclusion of employees or job applicants who merely test positive for infection.

An individual with a fully developed case of AIDS, however, poses a different problem. A court would be forced to decide whether there was any risk in allowing the AIDS sufferer to continue working with others. If the AIDS employee is at risk of contracting a communicable opportunistic disease that accompanies AIDS, the employer might contend that the employee is a present risk to those co-workers who are immuno-suppressant. The courts, however, still may find that an employer could reasonably accommodate this worker by isolation from others.

d. The Duty To Accommodate.—The duty to accommodate will become an issue in any AIDS handicap discrimination case. Even under section 504, which does not specifically contain an accommodation requirement, the Supreme Court has indicated that the failure to accommodate nevertheless may violate that section. In *Southeastern Community College v. Davis*[75] the Court noted that "situations may arise where a refusal to modify an [employer's] existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [HHS]."[76] The Department of Health and Human Services has imposed in its regulations a duty to make reasonable accommodations for the handicapped,[77] as have most state fair employment agencies. Ap-

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73. *See* Maine Human Rights Comm'n v. Canadian Pacific, Ltd., 458 A.2d 1225, 1234 (Me. 1983); Baltimore & Ohio R.R. v. Bowen, 60 Md. App. 299, 309, 482 A.2d 921, 926 (1984).

74. *See* Osborn, *supra* note 11, at 50.

75. 442 U.S. 397 (1979).

76. *Id.* at 412-13. *See also Arline*, 55 U.S.L.W. at 4249.

77. *See* 45 C.F.R. § 84.12 (1986). In addition, although § 503 does not specifically

propriate accommodations might include a leave of absence, light duty work if available, or changes in the work schedule.[78] *Arline* specially noted that "although [employers] are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."[79]

2. Are AIDS Victims Members of Any Other Protected Class?—a. Protected Classes Under Title VII and its State Counterparts.—Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against individuals on the basis of "race, color, religion, sex, or national origin."[80] In *Griggs v. Duke Power Co.*[81] the Supreme Court recognized that Title VII prohibits not only overt discrimination, but also "practices that are fair in form, but discriminatory in operation."[82] It is not necessary to show discriminatory motivation because the Act is directed to correct "the *consequences* of employment practices, not simply the motivation."[83] Many state and local antidiscrimination agencies have adopted this "adverse impact" theory of liability for discrimination and have applied it in the context of laws that discriminate on the basis of characteristics other than those listed in Title VII.[84] For example, in several states, sexual preference or sexual orientation is a protected characteristic.[85]

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require accommodation, one could argue that, by imposing on employers the duty to take affirmative action, it implicitly requires accommodation.

78. Reasonable accommodations are required so long as they do not result in an "undue hardship" on the business. *Id.* It is unclear whether the duty to accommodate the handicapped will be interpreted as broader than the duty imposed by Title VII of the Civil Rights Act of 1964 to accommodate religious needs. *Cf.* Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367, 372 (1986) (holding that, under Title VII's duty to accommodate an employee's religious beliefs, an employer who offers a reasonable accommodation to an employee is not required to accede to the employee's preference for an alternate accommodation); Trans World Airlines v. Hardison, 432 U.S. 63, 82 (1977) (reasonable accommodation does not require that employer deny some employees their shift and job preference in order to accommodate religious needs of other employees).

79. *Arline*, 55 U.S.L.W. at 4249 n.9.

80. 42 U.S.C. § 2000e-2 (1982).

81. 401 U.S. 424 (1971).

82. *Id.* at 431.

83. *Id.* at 432 (emphasis in original).

84. *See, e.g.*, Brunback v. Jensen, No. H76-7 (Md. Comm'n on Human Relations 1984) (applying MD. ANN. CODE art. 49B, § 14 (1986), which in addition to the Title VII protections, protects age, marital status, and physical and mental handicaps).

85. The following states have issued executive orders prohibiting discrimination by state government agencies based on sexual orientation: California (Exec. Order No. B-54-79, April 4, 1979) (summarized in 8A Fair Empl. Prac. Man.-State Laws (BNA) 453:853 (Sept. 1983)); New York (Exec. Order No. 28, Nov. 18, 1983) (summarized in

About seventy-four percent of AIDS victims have been homosexual or bisexual men.[86] Using *Griggs'* adverse impact theory, homosexual and bisexual AIDS victims no doubt could argue that policies limiting their employment rights have an adverse impact on them, and therefore violate state or local laws that make sexual preference a protected characteristic.[87] In Wisconsin, for example, where the state's fair employment law prohibits discrimination on the basis of sexual orientation,[88] the Wisconsin Department of Industry, Labor and Human Relations has held that "given the fact that 73% of those with AIDS are sexually active homosexual and bisexual men, the respondent's policy [excluding AIDS victims from working in a school setting] has a disparate impact on that group of people because of their sexual orientation."[89] This argument, however, would probably fail under Title VII because the courts have declined any opportunity to expand judicially Title VII's prohibition on "sex" discrimination to include sexual preference.[90]

Similarly, it might also be possible for an individual of Haitian or African descent discriminated against because of actual or suspected AIDS infection to assert a violation of Title VII based on

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8A Fair Empl. Prac. Man.-State Laws (BNA) 455:3072 (Mar. 1985)); and Pennsylvania (Exec. Order No. 1975-5, Sept. 19, 1978), *reprinted in* 8A Fair Empl. Prac. Man.-State Laws (BNA) 457:831 (July 1979). At least two states have included the prohibition against sexual orientation discrimination in their fair employment policies and, as a result, the prohibition is not limited to government employers: District of Columbia (Human Rights Act of 1977, title 1, ch. 25, *codified at* D.C. CODE ANN. § 1-2512 (1981), *reprinted in* 8A Fair Empl. Prac. Man.-State Laws (BNA) 453:1605 (June 1985)); Wisconsin (Fair Employment Act, title 13, ch. 11, *codified at* WIS. STAT. ANN. § 111.36 (1)(d)(1) (West Supp. 1986), *reprinted in* 8A Fair Empl. Prac. Man.-State Laws (BNA) 457:3210 (Sept. 1985)).

86. *See supra* note 6.

87. Of course, as AIDS spreads to the heterosexual community, policies that have an adverse impact on AIDS victims will not necessarily discriminate on the basis of sexual preference.

88. WIS. STAT. ANN. § 111.31 (West 1974 & Supp. 1986).

89. Racine Educ. Ass'n v. Racine Unified School Dist., No. 8650279 (Wis. Dep't of Indus., Lab. & Human Relations, Equal Rights Div. April 30, 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1986).

90. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender."); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII or Section 1981."). In contrast, some courts have held that heterosexual persons may sue under Title VII for homosexual or lesbian *harassment*. *See, e.g.*, Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983) (male employee was solicited by a homosexual manager; court found that "unwelcomed *homosexual* harassment also states a violation of Title VII") (emphasis in original), *aff'd*, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (same conclusion).

national origin. Previously, Haitians were thought to be at high risk of contracting AIDS. Although the risk is no longer associated with this group,[91] a Haitian might assert adverse impact under Title VII because the publicity surrounding the group still lingers. Similarly, because the media currently is reporting the widespread AIDS epidemic in African nations,[92] persons of African descent may be entitled to protection if employers discriminate against them because of the link between AIDS and their national origin.

b. Protection Under the Equal Protection Clause.—The equal protection clause of the fourteenth amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[93] or, in other words, that similarly situated persons should be treated in a similar fashion.[94] When state action[95] establishes a class of people who are treated differently from others, for example by adopting a personnel regulation requiring that AIDS victims be denied certain kinds of jobs, it is appropriate to inquire whether the classification denies equal protection of the laws.

For most types of state action, the courts look only to see whether the established classification "bears some fair relationship to a legitimate public purpose."[96] This "rational relationship" standard, however, does not apply to all classifications. Over the years, several "suspect" and "quasi-suspect" classifications have devel-

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91. The Centers for Disease Control removed Haitians from the list of the AIDS high-risk groups. The involvement of Haitians in the epidemic is explained by one commentator in this way:

> Haiti is apparently a favorite vacation spot for many homosexual men, and antibody screening among individuals in Haiti has revealed that whereas the general population is not notably antibody positive, the Carrefour district of Port-au-Prince—said to be the most concentrated locale of both male and female prostitutes—has a relatively high representation of antibody-positive individuals.

Osborn, *supra* note 11, at 50.

92. It is reported that AIDS is endemic to the African countries of Zaire, Burundi, Uganda, Rwanda, Tanzania, and Kenya. *See* Langone, *supra* note 15, at 31.

93. U.S. CONST. amend. XIV § 1. The same equal protection analysis of the fourteenth amendment that is applied to the states is also applied to the federal government through the due process language of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

94. Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982).

95. The prohibition extends to any type of "state action," which includes the acts not only of state and local governments and their agents and instrumentalities but also of private employers that are sufficiently involved with the government. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to be involved in it").

96. *Plyler*, 457 U.S. at 216.

oped and state action that affects these groups must satisfy a stricter scrutiny.

Specifically, race and alienage are suspect classifications[97] and, as such, state action discriminating against these groups will be sustained only if it is reasonably tailored to serve a *compelling state interest*.[98] Several quasi-suspect classifications have been subjected to an intermediate level of scrutiny. Thus, for classifications based on gender and illegitimacy, the test sometimes applied is whether the classification is substantially related to an *important governmental objective*.[99] In contrast, other classifications have not been subjected to the heightened scrutiny of a suspect or quasi-suspect class. These groups include age[100] and wealth[101] groups and handicapped persons.[102] State action discriminating on the basis of these group characteristics must merely be rationally related to a legitimate government purpose.

As discussed in the previous section on Title VII, most courts distinguish discrimination based on sexual preference or orientation from discrimination based on sex or gender.[103] Because AIDS afflicts primarily those with a certain sexual preference, courts are not likely to apply the sex/gender intermediate level of constitutional scrutiny to a classification of AIDS victims. Similarly, because the Supreme Court has held that legislation discriminating against the

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97. *See generally* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (central policy behind the fourteenth amendment to eliminate official discrimination based on race renders racial classifications constitutionally suspect); Graham v. Richardson, 403 U.S. 365, 376 (1971) (alienage classifications are suspect).

98. *See, e.g.*, Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981).

99. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-26 (1982) (gender classifications are "quasi-suspect"); United States v. Clark, 445 U.S. 23 (1980) (illegitimacy classifications are "quasi-suspect").

100. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

101. Black v. Sullivan, 561 F. Supp. 1050 (D. Me. 1983).

102. City of Cleburne, Tex. v. Cleburne Living Center, 105 S. Ct. 3249, 3255 (1985). The *Cleburne* Court declined to hold that retarded individuals constitute either a suspect or a quasi-suspect class, explaining that

> it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the *disabled*, the mentally ill, and the *infirm*. We are reluctant to set out on that course, and we decline to do so.

Id. at 3257-58 (emphasis added).

As a result, legislation affecting retarded individuals was not subject to heightened scrutiny.

103. *See supra* text accompanying notes 80-92.

handicapped will not be subjected to heightened scrutiny, it appears that AIDS victims would not be a suspect or quasi-suspect class under this theory. Accordingly, legislation classifying individuals based on their affliction or degree of affiliation with AIDS (*e.g.*, testing positive for the AIDS antibody) most likely would be subject only to scrutiny under the rational relationship standard.

B. What Is the Extent of the AIDS Victim's Right of Privacy?

A major concern of both AIDS victims and employers is the extent to which employers have the right to inquire about or test an employee or job applicant for AIDS. Closely connected is the question of what employers can and cannot legally do with any information derived from such inquiries or tests. Statutory, common, and constitutional laws apply.

1. Screening Issues.—AIDS testing may violate not only employees' statutory rights, but also their common-law rights to privacy and, in the public sector, their constitutional rights to privacy and to be free from unreasonable search and seizure under the fourth amendment.

a. Legislative Restrictions on AIDS Screening.—To assure privacy for AIDS victims, some states and localities have enacted legislation banning AIDS testing or limiting the use of testing results in the employment context.[104] Even without specific legislation, employers may be prohibited from using the results of such tests for employment decisions in jurisdictions in which AIDS is a protected

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104. For example:
— A California law, effective January 1, 1986, bans the use of test results for the AIDS virus "for the determination of insurability or suitability for employment." 1985 Cal. Legis. Serv. 22 (West), *reported in* 4 Lab. Rel. Rep. (BNA) 14:210(h) (Sept. 29, 1986).
— The Massachusetts Commission Against Discrimination stated in January 1986 that preemployment inquiries concerning AIDS are prohibited. *Reported in* 2 Empl. Prac. Guide (CCH) ¶ 5025 (Jan. 1986).
— The New Jersey Division on Civil Rights announced that state law prohibits an employer from conditioning employment on taking an AIDS test, unless the employer can show that an employee who tests positive could not perform the job in question without jeopardizing the health and safety of the employee or others. *Reported in* 2 Empl. Prac. Guide (CCH) ¶ 5027 (July 1986).
— The Mayor of Philadelphia, W. Wilson Goode, issued an executive order prohibiting the screening of city employees or clients for AIDS. *Reported in* Daily Lab. Rep. (BNA) No. 86, at A-4 (May 5, 1986).
— Section 3809 of San Francisco Ordinance No. 49985 prohibits testing designed to show that a person has AIDS or any AIDS-associated condition unless the employer "can show that absence of AIDS is a bona fide occupational qualification." *Reprinted in* 3 Empl. Prac. Guide (CCH) ¶ 20,950B (Dec. 1985).

handicap. Under most handicap discrimination statutes, employers may consider AIDS test results in employment decisions only if they can show a link between test results and job qualifications. In other words, unless the employer could prove that persons testing positive for AIDS antibodies are not "otherwise qualified" for the job, the use of test results as an exclusionary standard would be prohibited.[105] Because the present AIDS screening tests determine only the presence of the antibodies, however, and not necessarily the presence of contagious virus or any degree of disability, many individuals who test positive could still perform their jobs.

b. Common-Law Privacy Restrictions.—In addition to statutory restrictions on the right to screen for AIDS, most states recognize a common-law right to personal privacy, so that the unreasonable intrusion into another person's seclusion or private affairs supports a claim for compensatory and punitive damages. In the employment context, such suits involve the employer's accumulation of "private" information both through searches of employees' lockers or other personal belongings and through various tests or requests for medical information.[106]

An actionable intrusion might occur if an employer performed an AIDS test without the employee's knowledge or consent. The intrusion "must be something which would be offensive or objec-

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105. *See, e.g.*, *supra* note 104; 41 C.F.R. § 60-741.6(c)(2)-(3) (1986); 45 C.F.R. § 84.14 (1986). Some states also generally prohibit both preemployment medical questions that are not job-related in a timely and material way and preemployment medical exams that are not designed to establish ability to do the job. *See, e.g.*, MD. ANN. CODE art. 100, § 95A (1985). Although *Arline* did not specifically address the AIDS testing issue, its determination that "courts ordinarily should defer to the reasonable medical judgment of public health officials" suggests that employers and courts should defer to the Centers for Disease Control's recommendation that AIDS testing generally is not necessary in the workplace. *See* CDC, RECOMMENDATIONS, *supra* note 5.

106. *See, e.g.*, Valencia v. Duval Corp., 132 Ariz. 348, 645 P.2d 1262 (Ariz. Ct. App. 1982) (conduct of company personnel supervisor and company-designated physician, who telephoned employee's physician to obtain medical information, was not sufficiently "extreme and outrageous" conduct so as to entitle employee to prevail on invasion of privacy claim); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984) (holding that it was an invasion of privacy to search employee's locker when employee and not employer maintained key to locker). An employer may also create a contractual right of privacy for its employees by virtue of policy statements or employee handbook provisions guaranteeing employees that the employer will not inquire into certain aspects of their private lives, or that certain information about them will be kept confidential. *See, e.g.*, Rulon-Miller v. I.B.M., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (employer held liable to employee for intentional infliction of emotional distress and breach of employment contract when it terminated her for dating competitor's employee, since, under IBM's personnel policies, plaintiff had right to be free of inquiries into personal life).

tionable to a reasonable person."[107] To many people, the use without consent of a blood sample for the ELISA or Western Blot test for AIDS would be unexpected and objectionable. A positive result could provoke adverse employment actions by prospective employers and lead to unfavorable inferences about how the employee was exposed to the disease. Thus, an invasion of privacy claim probably could be made.

As with other torts, consent to the intrusion is a defense.[108] Moreover, in deciding whether to impose liability, courts generally balance the employer's need to know the accumulated information against the employee's reasonable expectation of privacy.[109] Employers might contend that they have a reasonable need to know whether the cause of an employee's or applicant's discernible symptoms, such as weakness or susceptibility to certain diseases, is due to AIDS or ARC because, as discussed previously,[110] a reasonable probability that the employee would be unable to perform the job within the reasonably foreseeable future might justify an adverse employment decision.

A bizarre lawsuit recently filed against an airline might at first glance spur some employers to test for AIDS in some jobs. In *Jane Doe v. American Airlines*[111] a passenger filed a $12 million lawsuit against the airline after one of its employees allegedly bit her. The employee subsequently tested positive for the AIDS antibody. The suit's legal theories include a claim that the airline was negligent in hiring the employee because it knew or should have known of the employee's violent personality and exposure to the AIDS virus. Although the suit certainly raises the specter of exorbitant monetary claims for negligent hiring against employers who knew or reasonably should have known their employees were both infected with AIDS and likely to spread it within the context of their employment,[112] current medical knowledge suggests that such claims might

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107. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 855 (5th ed. 1984).

108. *See id.* at 867.

109. *See, e.g.*, Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392, 394 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979) (employee had no reasonable expectation of privacy in personal telephone calls made from telephone he knew would be monitored at all times); Thomas v. Gen. Elec. Co., 207 F. Supp. 792, 799 (W.D. Ky. 1962) (employer did not unreasonably invade the privacy of employees by taking photographs of them during the performance of their duties because employer had reasonable need for the photographs as part of a work efficiency study).

110. *See supra* text accompanying note 73.

111. No. 86 L 19638 (Cook County Cir. Ct. filed Sept. 2, 1986), *reported in* Daily Lab. Rep. (BNA) No. 173, at A-5 (Sept. 8, 1986).

112. Negligent hiring or retention claims have been recognized in several jurisdic-

be successfully and more easily defended with evidence that the employer investigated applicants for violent tendencies than with evidence that it tested them for the AIDS antibody.

c. Constitutional Restrictions.—Medical tests, including tests for AIDS, might also run afoul of public sector employees' constitutional rights to privacy and to be free from unreasonable searches and seizures.[113] Again, reasonable need to know or "probable cause" to believe an unsafe condition exists might justify testing.[114] Given the current position of the medical community that AIDS is not transmittable by casual workplace conduct but only by conduct of an intimate nature, however, employers may find it hard to establish that they need to know whether an employee or applicant tests positive to the AIDS antibody. This is particularly true in view of the fact that a positive test for the antibody does not necessarily establish that the employee's body harbors the AIDS virus at that time.[115]

Nevertheless, at least two federal agencies have begun AIDS testing programs for employees and applicants. The State Department has announced plans to test foreign service applicants, employees, and their dependents for exposure to the AIDS virus. The State Department says its mandatory screening order is necessary because overseas medical care could prove to be inadequate to handle the health needs of a seropositive individual. Moreover, persons traveling overseas often require vaccinations before traveling to certain areas, and adult seropositive individuals should, in principle, avoid any vaccination. Finally, the State Department depends upon the overseas local American community to provide blood for transfusions in countries that do not test their own blood donations for the AIDS antibodies. Initial screening by the State Department will

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tions. *See, e.g.*, Henley v. Prince George's County, 305 Md. 320, 336, 503 A.2d 1333, 1341 (1986) (recognizing negligent hiring claim by relatives of murder victim who was killed by ex-convict working as security guard).

113. *See, e.g.*, Capua v. City of Plainsfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325-26 (Fla. Dist. Ct. App. 1985); Caruso v. Ward, 506 N.Y.S.2d 789, 799 (N.Y. Sup. Ct. 1986) (striking down a proposed policy to conduct random drug testing on police employees because the random standardless testing could not meet the reasonableness requirements under the fourth amendment).

114. *Cf.* Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) (New Jersey Racing Commission rules requiring jockeys to submit to breathalyzers and post-race urine tests do not violate their constitutional rights because unique nature of racing profession justifies the need for random drug testing).

115. *See supra* note 2.

ensure that potential donors have not been exposed to the antibody.[116]

The Department of Labor also has announced plans to conduct AIDS tests on Job Corps applicants and current trainees. The department justified the proposed testing based on its responsibility for the health and safety of Corps members who live and work in residential Job Corps centers. A spokesperson explained that the Labor Department is "responsible for Corps members 24 hours a day, seven days a week." Because these are coed centers, the department feels it is responsible "to provide them with a healthy, disease-free environment."[117]

2. Disclosure Problems.—Once an employer learns, whether through AIDS testing or a voluntary disclosure, that an employee or applicant has AIDS or is seropositive, the employer must handle this information with extreme caution. Potential liability exists for defamation, invasion of privacy, and intentional or negligent infliction of emotional distress. Nevertheless, the employer may also be liable to infected employees or job applicants if it does *not* disclose positive test results to the infected individual.[118]

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116. *Reported in* Daily Lab. Rep. (BNA) No. 231, at A-9 (Dec. 2, 1986). This policy has been challenged by a government employees' union, which has filed suit against the State Department's AIDS testing on the grounds that such testing violates employees' privacy rights guaranteed under the first, fourth, fifth, and ninth amendments. Local 1812, Am. Fed. of Gov't Employees v. United States Dep't of State, No. 87-0121 (D.D.C. 1987), *reported in* Daily Lab. Rep. (BNA) No. 13, at A-20 (Jan. 21, 1987). As a result of *Arline*, claims also can be expected under the Rehabilitation Act.

117. *Reported in* Daily Lab. Rep. (BNA) No. 244, at A-2 (Dec. 19, 1986). Opponents promise to challenge this testing policy in court. Rep. Ted Weiss, Chairman of the House Government Operations Subcommittee on Intergovernmental Relations and Human Resources, says that AIDS testing is "one thing for the military, another for the Foreign Service, and quite another for [the Job Corps], where there is absolutely no medical justification and [AIDS testing is] totally contrary to the PHS guidelines." *Reported in* Daily Lab. Rep. (BNA) No. 244, at A-3 (Dec. 19, 1986). Weiss has requested the Secretary of Labor, William Brock, to explain the program's necessity in light of PHS guidelines recommending against AIDS testing in schools and employment. In addition, the legislative counsel for the American Civil Liberties Union, Barry Lynn, has stated that the Job Corps testing "creates very serious policy issues that are certain to be litigated." *Id.*

118. In some cases, employers have been held liable for not alerting employees to medical problems discovered through routine preemployment or employment physicals. *See, e.g.*, Dornak v. Lafayette Gen. Hosp., 399 So. 2d 168 (La. 1981) (hospital employer that gave preemployment physical which revealed tuberculosis had duty to disclose condition to tested employee). Query whether the failure to disclose a contagious condition to the employee would make the employer liable to a third party whom the tested employee unknowingly exposed? *Cf.* Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (N.Y. Sup. Ct. 1959) (wife who caught tuberculosis from husband had cause of action against his employer who, she claimed, knew of condition and failed to

a. Defamation.—Defamation is defined as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[119] Generally, if an employer discloses that an employee tested positive for the AIDS antibody, the employee may have a defamation claim based on one or all of three possible inferences. The employee may assert a defamation claim on the grounds that the reference to AIDS implies that the employee is either a homosexual person[120] or an intravenous drug user. Alternatively, the employee might contend that because AIDS can be considered a venereal disease,[121] the employer has imputed that the employee has a "loathsome disease."[122]

Consent, truth, and privilege are defenses that the employer may use to defeat a defamation claim.[123] In most states, communications regarding an employee by a former to a prospective employer may be conditionally privileged.[124] Distribution of the defamatory material outside the "qualified privileged circle" of people who need the information destroys the privilege.[125]

b. Invasion of Privacy.—In addition to liability for defamation and emotional distress, an employer who discloses that an employee has AIDS or is seropositive may be liable under a second theory of

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disclose it to her or her husband). It is possible that putting in the exam consent form a disclaimer of any duty to disclose would absolve the employer of this duty. Nevertheless, employers may be required to release such test results under OSHA "Access Standard" regulations. *See infra* text accompanying notes 171-73.

119. W. KEETON, *supra* note 107, at 773.

120. *Cf.* Linn v. United Plant Guard Workers of America, 383 U.S. 53, 65 n.7 (1966) (defamation includes accusing a person of having engaged in homosexual conduct); Buck v. Savage, 323 S.W.2d 363, 369 (Tex. Civ. App. 1959) (saying that one person is "queer" on another is "slanderous *per se* because [it] impute[s] to appellee the commission of the crime of sodomy . . .").

121. AIDS, transmitted through sexual activity, could be classified as a venereal disease. *See* 4 SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE V-50 (1986) ("venereal" defined as "pertaining to, or involving, sexual intercourse").

122. For a historical review of why a statement that one has venereal disease is considered slander actionable without proof of damages, see W. KEETON, *supra* note 107, at 788-90.

123. *Id.* at 823-39.

124. *See, e.g.*, Sindorf v. Jacron Sales Co., 27 Md. App. 53, 68, 341 A.2d 856, 866 (1975), *aff'd*, 276 Md. 580, 350 A.2d 688 (1976); Bratt v. I.B.M. Corp., 392 Mass. 508, 509, 467 N.E.2d 126, 129 (1984).

125. *E.g.*, Stearns v. Ohio Sav. Ass'n, 15 Ohio App. 3d 18, 20, 472 N.E.2d 372, 374-75 (1984) (privilege did not extend to circulating to other employees defamatory publication concerning discharge).

privacy invasion—the public disclosure of private facts. If an employer publicly discloses AIDS test results, even if true, and that disclosure would be objectionable to a person of ordinary sensibilities, a claim for invasion of privacy might succeed.[126]

c. Emotional Distress.—An intentional or negligent infliction of emotional distress claim might be joined to other causes of action if the employer's conduct in releasing the information is extreme and outrageous.[127] The manner in which the employer discloses test results, or its actions after learning the result, might support this claim.[128] If the employer acts "beyond all possible bounds of decency,"[129] then the employee may be entitled to damages.

C. Other Remedies for AIDS Victims

1. Unemployment Compensation.—Employees who voluntarily resign from their positions must prove they had good cause to quit and that they are able and available for other employment before they can receive unemployment benefits.[130] "Good cause" is necessarily a relative term because states differ in their interpretation of the phrase.[131] While some states consider any employee illness "good cause" for a voluntary resignation, most restrict "good cause" to illnesses resulting from work-related causes.[132] In those states, AIDS victims forced to quit due to illness would not qualify for benefits because the disease is not "work-related," unless, of

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126. *See* Forsher v. Bugliosi, 26 Cal. 3d 792, 808-09, 608 P.2d 716, 725, 163 Cal. Rptr. 628, 637 (1980) (stating elements of action for invasion of privacy); *cf.* Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 731, 300 N.W.2d 687, 689 (1980) (enunciating a test that disclosed information must be "highly offensive to a reasonable person and of no legitimate concern to the public").

127. *See* RESTATEMENT (SECOND) OF TORTS § 46 comments d, j, k (1965) ("liability has been found . . . where the conduct has been so outrageous in character, . . . as to go beyond all possible bounds of decency").

128. Perhaps a general, public announcement to all employees that the plaintiff has AIDS or abusive or rude treatment after the diagnosis would constitute sufficiently outrageous conduct.

129. *See supra* note 127. Thus, even if the employee in fact is a homosexual person or a drug user, or has AIDS, a cause of action for emotional distress may still lie if the employer disseminates the information in an "outrageous" fashion.

130. *See* NATIONAL FOUND. FOR UNEMPLOYMENT COMPENSATION AND WORKERS' COMPENSATION, HIGHLIGHTS OF STATE UNEMPLOYMENT COMPENSATION LAWS 3 (Jan. 1985) (available at Suite 603, 600 Maryland Ave., S.W., Wash., D.C. 20024).

131. *Id.*

132. *See, e.g.*, McKnight v. Daniels, 268 Ark. 1056, 1057-58, 598 S.W.2d 436, 437 (Ark. Ct. App. 1980); Duffy v. Lab. & Indus. Relations Comm'n, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977) (chronic back ailment and personal illness do not constitute good cause to leave work voluntarily).

course, they could establish that they were exposed to it through work contacts. Moreover, even if the illness need not be connected to employment, individuals with AIDS still would be denied benefits in most states if they are not available to perform other suitable work that might arise.[133] For those who leave work due to harassment, however, unemployment benefits might be available under either constructive discharge or resignation for good cause theories.[134]

Ironically, a friend or relative who leaves the job to care for an AIDS victim may fare better under unemployment compensation laws than the victim. For example, a California unemployment board recently concluded that a man who voluntarily quit his job to care for a "family partner" afflicted with AIDS was entitled to unemployment compensation.[135] The employer had initially granted the employee a two-month leave of absence but denied a request for additional time, whereupon the employee resigned. A California

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133. *See, e.g.*, Fico v. Catherwood, 29 A.D.2d 1011, 289 N.Y.S.2d 249 (1968) (woman denied benefits because her physical disabilities limited her availability for other work); Carter v. Commission, Unemployment Compensation Bd. of Review, 65 Pa. Commw. 569, 573, 442 A.2d 1245, 1248 (1982) ("[c]laimant must be able to work and be available for suitable work in order to be entitled to benefits. Unemployment compensation is not health insurance and it does not cover the physically or mentally ill during the periods they are unemployable").

134. *See, e.g.*, Richards v. Daniels, 1 Ark. App. 331, 615 S.W.2d 399 (1981) (teacher voluntarily quit with good cause after being mistreated by other teachers and principal when she refused to sign a petition); Condo v. Board of Review, Dep't of Lab. & Indus., 158 N.J. Super. 172, 385 A.2d 920 (1978) (employee who was continually threatened with physical harm by co-worker had good cause to leave employment). *But cf.* Larson v. Department of Economic Security, 281 N.W.2d 667 (Minn. 1979) (because a harassed employee's failure to inform employer of co-workers' conduct did not allow employer to remedy the situation, employee was deemed to have voluntarily resigned without good cause).

Note that AIDS victims who leave their jobs because of abuse resulting in unbearable working conditions may have a cause of action for discriminatory constructive discharge under the applicable discrimination laws discussed earlier. *See supra* notes 56-57 and accompanying text. Generally an employee must prove the employer deliberately caused or allowed the working environment to become so intolerable that the employee was forced into an involuntary resignation. *See, e.g.*, Johnson v. Nordstrom-Larpenteur Agency, 623 F.2d 1279, 1281 (8th Cir. 1980); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (Title VII constructive discharge claim). To prove that the resignation was involuntary, the employee must show that a reasonable person in the employee's shoes would have felt compelled to resign. *See, e.g.*, Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 652, 477 A.2d 1197, 1202 (1984). Employers who harass workers because of their affliction with AIDS, or are aware of such harassment and allow it to continue, may face such federal and state constructive discharge claims.

135. No. SF-24774 (Cal. Unemployment Ins. Appeals Bd. Sept. 13, 1985), *reported in* Daily Lab. Rep. (BNA) No. 208, at A-8 (Oct. 28, 1985).

administrative law judge found "good cause" for the employee's decision to leave work temporarily to care for an ill family member or relative. The judge concluded that although the partner was not related through blood or marriage, "it is recognized that nonblood, nonlegal relationships may be established which are meaningful, if not more meaningful, than relationships created by blood or the bonds of marriage."[136]

2. ERISA.—Section 510 of the Employment Retirement Income Security Act[137] prohibits an employer from firing an employee in order to interfere with the attainment of any right to which the employee may become entitled under an employee benefit plan. Thus, employers may not fire employees before they qualify for a benefit plan or before their rights vest under the plan, for the purpose of preventing qualification or vesting.[138] Employers who discover in the early days of an employee's tenure that the employee has AIDS—that is, through test results or voluntary disclosures before insurance coverage applies—should bear in mind that the employee might claim that this, rather than a job-related problem, was the reason for discharge and seek a remedy under ERISA.

D. What Are the Rights of the Co-Workers of an AIDS Victim?

1. Co-Workers' Resistance to Working with AIDS Victims Generally.—In addition to dealing with the employee who suffers from AIDS, employers must consider the concerns and rights of the co-workers of AIDS victims. Frequently employees will want to know who among their customers, patients, or co-workers has AIDS and may want to avoid contact with those individuals.

Two recent cases illustrate the potential variety of problems and the range of settings in which they can occur. In the first case, a Minnesota arbitrator reinstated a prison guard who because of his fear of contracting AIDS had been discharged for refusing to con-

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136. *Id. Cf.* Cantrell v. Kentucky Unemployment Ins. Comm'n, 450 S.W.2d 235, 236-37 (Ky. 1970) (woman who took time off to nurse dying husband and was replaced did not leave voluntarily without good cause); Balduyck v. Employment Div., 72 Or. App. 242, 695 P.2d 944 (1985) (employee who took time off to assist ailing mother entitled to benefits when she was replaced).

137. 29 U.S.C. § 1140 (1982).

138. *See, e.g.*, Kross v. Western Elec. Co., 701 F.2d 1238, 1243 (7th Cir. 1983) (plaintiff had cause of action under § 510 based on claim that he was discharged to deprive him of participation in the company life and medical insurance plans); Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984) (employer violated § 510 by discharging an employee with multiple sclerosis in order to deny him employee benefit plans).

duct pat-down searches on prisoners.[139] Upon learning that a new inmate had AIDS-related complex (ARC), the prison warden had issued two memoranda, one to guards and the other to inmates. Although the memorandum to the guards simply advised that a prisoner had ARC and that fears of contagion were unwarranted, the memo to inmates cautioned that "no one really knows all the ways AIDS is transmitted, so be careful. Wash your hands regularly and practice good hygiene." Thereafter, the grievant refused to conduct pat-down searches unless allowed to wear gloves. His request was denied and he was discharged for failing to obey direct orders from his supervisor.

The arbitrator reinstated the guard without pay for two reasons. First, he found that the correctional institution, through its memorandum to the inmates, had reinforced the grievant's fear. Second, the warden had later changed his mind about permitting guards to wear gloves during pat-down searches and the arbitrator determined that he had done so as an accommodation to the reasonable fears expressed by other guards. Thus, the arbitrator concluded that, although refusals to work ordinarily would be sufficient grounds for discharge, in this case the employer was "at least partly responsible" for the employee's "exaggerated fear of contracting the disease."[140]

In the second case, *Pawlisch v. Barry*,[141] the Wisconsin Court of Appeals upheld the discharge of a county health board member who was fired because of his prejudice against persons afflicted with AIDS, over claims that the firing violated the board member's first amendment right of free speech. At a board meeting discussion of a resolution on AIDS, Pawlisch had stated: " 'Homosexual sex is immoral and unnatural. Even animals know better than to do that. With that kind of behavior, you have to pay the piper.' "[142] The county executive promptly demanded Pawlisch's resignation because of the executive's doubt that Pawlisch could act on health policies without discriminating against the homosexual community. When Pawlisch refused to resign, the county removed him from the board. The court ruled that Pawlisch held a policymaking position and that the elected chief executive's need to demand harmony with his nondiscrimination policies was a requirement for the job suffi-

139. Minnesota Dep't of Corrections, No. 85M-XVI-600-3183 (Dec. 10, 1985) (Gallagher, Arb.), *reported in* Daily Lab. Rep. (BNA) No. 26, at A-4 (Feb. 7, 1986).

140. *Id.*

141. 126 Wis. 2d 162, 376 N.W.2d 368 (Wis. Ct. App. 1985).

142. *Id.* at 164, 376 N.W.2d at 370.

cient to override Pawlisch's first amendment rights.[143]

As these two cases suggest, an employee's right to know whether anyone in the work environment is infected with AIDS, or to voice opposition or refuse to work with AIDS victims, will vary depending on the work setting and other peculiarities of the situation at hand. For example, provisions in labor agreements and employee handbooks (in states in which such handbooks create contractual rights) on subjects such as disciplinary rules, grounds for discharge, physical exams, confidentiality of employee information, health and safety, and employee privacy rights should always be reviewed. In some states or locales the matter may be governed by a local ordinance. Special rules may apply in the public sector in which, as in *Pawlisch*, political considerations or personnel regulations may be present. In addition, most employers will need to review the rights of protesting employees in light of the federal statutes discussed below.

In general, the more information about AIDS an employer has provided to its employees, the greater the employer's chances of being able to show the unreasonableness of the employee protests. Moreover, to the extent that AIDS victims are protected by handicap or other antidiscrimination statutes, an employer may not discharge AIDS employees because co-workers or customers prefer to avoid contact with those employees.[144]

2. Obligations Under the National Labor Relations Act.—a. Duty to Bargain.—Section 8(d) of the National Labor Relations Act requires that the employer and union bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."[145] Safety rules and practices are "conditions of employment" under this section.[146] In those work environments in which the presence or potential transmission of AIDS clearly poses a threat to worker

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143. *Id.* at 167, 376 N.W.2d at 372.

144. Customer or co-worker preference is never a justification for discrimination, except perhaps in the rare instance when the customer or co-worker preference goes to the very essence of the business operation, which would be undermined if the preference was not honored. *See* Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1199 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (passenger preference for unmarried stewardesses insufficient to justify airlines' "no-marriage" rule); Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (airline passenger preference for female flight attendants insufficient to justify exclusion of males from job).

145. 29 U.S.C. § 158(d) (1982).

146. *See, e.g.*, NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967); *cf.* San Isabel Elec. Serv., Inc., 225 N.L.R.B. 1073, 1078 n.6 (1976) (safety rules also subject of mandatory bargaining under the Labor Management Relations Act).

safety, employers may have to bargain in good faith over any proposed AIDS policy or testing program covering unionized workers.[147]

If AIDS is a subject for mandatory bargaining, several issues arise regarding the flow of information between the employer and union concerning AIDS victims in the workplace. The employer's duty to bargain in good faith includes an additional duty to supply the union with "requested information that will enable [the union] to negotiate effectively and to perform properly its other duties as bargaining representative."[148] At some point, a union may demand information pertaining to the health of employees suspected to be AIDS victims, raising the issue of the employer's obligation to disclose such information as part of its duty to bargain.

Indeed, in *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*[149] the union contended that, in order to bargain effectively on issues pertaining to health and safety, it needed various company health and safety records, including worker mortality statistics, laboratory studies of employees, and health information obtained through workers' compensation and insurance claims.[150] The companies objected to the release of the information. The court held that if the employers could delete from the records names and any other information that could link the record to a specific employee, releasing the information would not violate employees' rights to privacy and confidentiality.[151] Union requests for information about the incidence of AIDS in the workplace might be handled in the same way.

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147. *Cf., e.g.*, International Bhd. of Elec. Workers, Local System Council, U-9 v. Metropolitan Edison Co., No. 86-4426 (E.D. Pa. Aug. 14, 1986) (WESTLAW, Allfeds library) (granting temporary restraining order blocking random testing unilaterally implemented by employer pending arbitration on the matter); International Bhd. of Elec. Workers, Local 1900 v. Potomac Elec. Power Co., 634 F. Supp. 642, 645 (D.D.C. 1986) (denying preliminary injunction of unilaterally revised drug testing program after employer agreed to limit testing to the scope of previous policy pending outcome of arbitration); Murray v. Brooklyn Union Gas Co., No. 7692/86 (N.Y. Sup. Ct., Kings County April 1, 1986) (granting temporary restraining order halting unilaterally implemented random urine drug testing program pending arbitration). *But see* Brotherhood of Maintenance of Way v. Burlington Northern R.R., 802 F.2d 1016, 1024 (8th Cir. 1986) (upholding unilaterally implemented drug testing program as necessary adjunct to enforcement of disciplinary rules).

148. Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979).

149. 711 F.2d 348 (D.C. Cir. 1983).

150. *Id.* at 352-53, 355, 356-57.

151. *Id.* at 363.

b. "Concerted Activity" Under Section 7.—Section 7 of the National Labor Relations Act[152] gives workers the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[153] Both union and nonunion employees may be protected when they protest what they in *good faith reasonably believe* to be an unsafe working condition.[154] Terminating employees who act in concert to oppose the employment of an individual with AIDS, or who refuse to perform services for an AIDS victim may therefore violate employee rights under section 7. So far, no National Labor Relations Board decision has addressed the issue of whether, given the current medical evidence that AIDS is not spread through casual contacts, the fear of contracting AIDS through the workplace could be a "reasonable and honest belief" justifying protection under section 7.[155] Even if employees who walk off the job in concert to protest a requirement that they work with AIDS victims are engaged in "protected concerted activity," however, they may be "permanently replaced" (although not discharged) if the protest does not pertain to any unfair labor practice by the employer.[156]

3. Obligations Under Section 502 of the Labor Management Relations Act.—Most unionized employees are covered by a collective bargaining agreement containing clauses that require them to arbitrate rather than strike over disputes concerning work conditions covered by the labor agreement. Under section 502 of the Labor Management and Relations Act,[157] however, individuals or employee groups do not violate a no-strike clause in a labor agreement when they walk off the job "*in good faith* because of abnormally dangerous

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152. 29 U.S.C. § 157 (1982).

153. *Id.*

154. *See* NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 837 (1984) (employee's action must be based on a "reasonable and honest belief"). *But cf.* Quality C.A.T.V., Inc., 121 L.R.R.M. (BNA) 1297 (NLRB Mar. 27, 1986) (if concerted protest was not violent or disruptive, "reasonableness of workers' decisions to engage in concerted activity is irrelevant" and refusal to work to protest uncomfortable working conditions or supervisor's lack of concern is protected).

155. One commentator has suggested that workers could use the "fear of contagion" exception created in the Justice Department Memorandum on § 504 to justify their "honest belief." *See* Michael Cecere, Comments to the Am. Bar Ass'n Annual Meeting (Aug. 10, 1986), *reported in* Daily Lab. Rep. (BNA) No. 156, at A-8 (Aug. 13, 1986).

156. Employees who strike to protest an employer's unfair labor practice are entitled to reinstatement even if the employer has hired permanent replacements. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938). Workers who strike for economic reasons (any reason that is neither caused nor prolonged by an unfair labor practice committed by the employer), however, may be permanently replaced during the strike and the employer is under no duty to reinstate them at the end of the strike. *Id.*

157. 29 U.S.C. § 143 (1982).

conditions for work at the place of employment . . . ."[158]

Note, though, that "the reasonable and honest belief" that would entitle workers to the protection of section 7 of the NLRA may not be sufficient to satisfy the section 502 "good faith" requirement. The Supreme Court held in *Gateway Coal Co. v. United Mine Workers*[159] that a work stoppage under section 502 must be supported by "ascertainable, objective evidence" that the condition is an abnormally dangerous condition.[160] Given this evidentiary requirement, it is unlikely that employees could justify walking off the job merely because a co-worker has AIDS or has tested positive for exposure to the virus. Although employees may argue that researchers have not answered all questions concerning the disease, currently there is simply no "ascertainable, objective evidence" to support a conclusion that the presence of an AIDS victim in the workplace poses an "abnormally dangerous condition."

4. Occupational Safety And Health Laws.—a. OSHA Standards on Exposure to Illness in the Workplace.—Under the Federal Occupational Safety and Health Act of 1970 (OSHA),[161] employers generally have two duties: a specific duty to comply with all occupational safety and health standards promulgated by the government, and a general duty to furnish employment in a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . ."[162] OSHA also prohibits employers from retaliating against employees who refuse to be exposed to a health hazard that they have asked the employer to correct and that they in good faith reasonably believe poses a danger of death or serious injury.[163] Employers who have sufficiently educated their employees about AIDS should be able to show that employee fears are unreasonable in most cases.

Currently, there is no federal occupational safety and health standard dealing specifically with AIDS in the workplace. The failure to take reasonable steps to protect employees against the risk of contracting a disease via exposure in the workplace, however, has been recognized as a violation of OSHA's general duty clause. For

158. *Id.* (emphasis added).
159. 414 U.S. 368 (1974).
160. *Id.* at 387; *accord* Economy Tank Line, 99 L.R.R.M. (BNA) 1198 (NLRB July 31, 1978).
161. 29 U.S.C. §§ 651-678 (1982).
162. *Id.* at § 654(a)(1).
163. *See id.* at § 660(c)(1); Marshall v. Babcock & Wilcox Co., 7 O.S.H. Cas. (BNA) 2021 (E.D. Mich. 1979).

example, an employer may violate the general duty clause by failing to vaccinate employees at risk of contracting anthrax.[164]

To establish a general duty clause violation, the government must prove that: (1) the employer failed to render its workplace free of the hazard;[165] (2) the hazard was recognized either by the cited employer or generally within the employer's industry;[166] (3) the hazard was causing or likely to cause death or serious physical harm;[167] and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard.[168] Given current medical information about AIDS, it is not likely that either allowing seropositive employees to continue working or requiring employees to work with AIDS patients would violate OSHA's general duty clause.[169] Nevertheless, it might be a general duty violation for those employers obliged to follow the CDC guidelines to fail to do so.[170]

b. The OSHA "Access Standard."—The "Access Standard," a federal occupational and health standard promulgated under OSHA, imposes an obligation upon employers who create medical and exposure records to ensure that employees and designated representatives have access to those records.[171] The standard defines "employee exposure record" broadly enough to include a specific virus, such as the HTLV-III virus responsible for AIDS, that has been shown to cause an acute or chronic health hazard.[172] Thus, if an employer establishes an AIDS testing program, it probably would

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164. *See* Secretary of Lab. v. Peter Cooper Corps., 10 O.S.H. Cas. (BNA) 1203 (Occupational Safety & Health Review Comm'n Nov. 23, 1981).

165. Continental Oil Co. v. Occupational Safety & Health Review Comm'n, 630 F.2d 446, 448 (6th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

166. St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm'n, 647 F.2d 840, 845 (8th Cir. 1981).

167. *Continental Oil Co.*, 630 F.2d at 448.

168. Babcock & Wilcox Co. v. Occupational Safety & Health Review Comm'n, 622 F.2d 1160, 1164 (3d Cir. 1980).

169. *Cf.* Bernales v. City & County of San Francisco, Nos. 11-17001-1 to 11-17001-4 (Cal. Lab. Comm'n), *reported in* Daily Lab. Rep. (BNA) No. 184, at A-6 (Sept. 9, 1985) (nurses' safety was not jeopardized by the hospital's refusal to permit them to wear personal protective equipment when treating AIDS patients).

170. For a discussion of the CDC guidelines, see *supra* note 5.

171. *See* 29 C.F.R. § 1910.20(e)(2) (1986).

172. *Id.* at § 1910.20(c)(5), (11). Subsection (c)(5) states in relevant part: " 'Employee exposure record' means a record containing any . . . information concerning . . . [b]iological monitoring results which directly assess the absorption of a substance or agent by body systems." Subsection (c)(11) states in relevant part: " 'Toxic substance or harmful physical agent' means any . . . biological agent (bacteria, *virus*, fungus, etc.), . . . which . . . [h]as yielded positive evidence of an acute or chronic health hazard in human,

be creating employee exposure records under the Access Standard, and individual employees or their designated representatives would be entitled to view these records.[173]

IV. CONCLUSION

There is much yet to learn about AIDS and ARC. As AIDS spreads and medical knowledge develops, the legal issues will emerge with greater clarity. For the moment, at least, education of the workforce is the best way to prevent and resolve conflicts among AIDS victims, co-workers, and employers.[174]

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animal or other biological testing conducted by, or known to, the employer. . . ." (emphasis added).

173. Employees are entitled to receive their own medical records from the employer. *Id.* at § 1910.20 (e)(2)(ii)(A). Alternatively, employees may authorize a designated representative (an individual or union) to receive the records. *Id.* at § 1910.20 (e)(2)(ii)(B). The regulations provide that an employer can withhold records if the requested records concern a terminal illness and the employer's physician believes direct access to the records could be detrimental to the employee's health. *Id.* at § 1910.20 (e)(2)(ii)(D). This exception is easily defeated, however, because the employer must provide the same information if requested by a designated representative. This release is permitted even if it is known that the records will be passed on to the employee. *Id.*

174. Although no national education program has been established to deal with the repercussions arising from the AIDS crisis, employers can contact state and local health departments to obtain the basic scientific facts about AIDS.